

VZCZCXRO8441  
PP RUEHCN RUEHGH RUEHVC  
DE RUEHIN #2442/01 3092235  
ZNR UUUUU ZZH  
P 052235Z NOV 07  
FM AIT TAIPEI  
TO RUEHC/SECSTATE WASHDC PRIORITY 7297  
INFO RUEHOO/CHINA POSTS COLLECTIVE  
RUEHBS/USEU BRUSSELS

UNCLAS SECTION 01 OF 02 TAIPEI 002442

SIPDIS

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E.O. 12958: N/A

TAGS: [ECON](#) [ETRD](#) [KIPR](#) [TW](#)  
SUBJECT: Taiwan IPR: Some Progress on Compulsory Licensing

REFTEL: TAIPEI 638

Summary

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11. (SBU) Responding in part to U.S. concerns, Taiwan has shown some progress on compulsory licensing, a practice whereby one company can request that the authorities force a rights-holder to grant the company a license for its patented product, often at a below-market rate. In one promising development, the Legislative Yuan (LY) has suspended debate on a proposed amendment to Article 76 of the Patent Act that would have allowed Taiwan authorities a broader use of compulsory licensing for pharmaceuticals and other patented products for domestic use and export. In a separate positive development, as part of a widely-watched test case on the use of compulsory licenses in Taiwan, the Dutch company Philips reached a payment settlement with a private Taiwan company for the company's past production of CD-Rs and CD-RWs under such a license. This case is far from wrapped up, however, with a decision still pending from the Taiwan High Court and an impending report from the EU's Trade Barriers Regulation (TBR) investigation into Taiwan's compulsory license scheme. End summary.

Background

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12. (SBU) Amending Article 76 the Patent Act was first mooted in 2006 by Chen Min-jen, an American citizen and member from the ruling Democratic Progressive Party (DPP) who serves as an "overseas representative" to the LY (reftel). In December 2006, the Legislative Yuan (LY) Economics and Energy Committee passed the current version of the draft amendment, which would allow Taiwan authorities to grant compulsory licensing of pharmaceuticals and other patented products if the rights-holder has "misuse[d] patent rights as determined by ... a court or a disposition made by the Fair Trade Commission of the Executive Yuan." This change would significantly relax the legal requirements for a local firm to obtain a compulsory license. It would allow a license to be issued even while an appeal from the rights-holder was pending, for example. The amendment also says that such compulsory licenses do not have to be "predominantly for the supply of the domestic market." This provision appears to go beyond the scope allowed by the 2001 Doha Declaration on the TRIPS Agreement and Public Health. The United States expressed concern on several occasions to the Taiwan side about both of these proposed changes under our ongoing IPR dialogue (reftel).

LY Won't Act on Bill, Sponsor Won't Seek Re-election

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13. (SBU) Taiwan Intellectual Property Office (TIPO) Secretary General Margaret Chen recently told econoff that the LY has

suspended discussion of the current Article 76 amendment. Chen said TIPO is drafting a new version of the bill that will take into account US objections and will follow more closely to the language of the 2001 Doha Declaration, and that TIPO will pass the new draft proposal to us by the end of November for comment. [Note: We have not seen a copy of this draft, nor do we know if it will reflect all U.S. concerns. End note.] Since the new version will have to gain EY approval and then start LY draft-law procedures again, she does not think that the LY will have time to consider the new version before the current legislative session ends December 31. [Note: Even if the EY got the new bill to the LY this session, the amendment would not be a priority issue for legislators and would almost certainly expire with the end of the session.]

14. (SBU) In addition, the amendment's sponsor in the legislature, Chen Min-jen, will not be re-elected to his at-large, overseas DPP seat. Although the DPP has not yet made public its short-list of at-large candidates for the upcoming LY elections, under the DPP's charter, an at-large legislator cannot serve two consecutive terms in the LY. Since Chen will not return to the LY next session, the language he proposed this session to give the Taiwan authorities a broad mandate to grant compulsory licenses is less likely find its way into subsequent versions of the Patent Act amendment.

#### Philips Reaches Settlement

15. (SBU) Philips Taiwan General Manager for IP and Standards James Li told econoffs on October 31 that on October 30 Philips and Taiwan's Gigabyte Storage Company reached a formal financial settlement of compensation to Philips for Gigastorage's past production of CD-Rs (Compact Disc-Recordable, a variation of the CD invented by Philips and Sony) and CD-RWs (Compact Disc Re-Writable) under a compulsory license granted by the Taiwan authorities in 2004. [Note: Although Philips is a Dutch company, it has extensive

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assets in the United States, and this case is a bellwether for the use of compulsory licenses in Taiwan. End note.] This is a worldwide settlement and ends all lawsuits brought by Philips against Gigastorage. In May 2007, after the EU initiated a Trade Barriers Regulation (TBR) investigation of the case, Gigastorage requested that TIPO nullify its original license approval, and the company stopped production of CD-Rs and CD-RWs in Taiwan on September 23. Gigastorage, however, had balked until now at paying licensing fees in full for the production run. Li would not reveal the size of the settlement, but he told us that it is a "real settlement" for a "substantial sum" to be paid in installments.

16. (SBU) Philips has also appealed Taiwan's original decision to compel the company to grant Gigastorage's license request, and expects that the Taipei High Administrative Court will hand down its ruling on this case by the end of the year. This is Philips' second and final appeal, and Li told us that despite the Gigastorage settlement, the company is continuing its appeal because Philips wants legal vindication that the original decision to grant a compulsory license was wrong.

17. (SBU) Philips believes that the pressure of the EU investigation is what changed attitudes at Gigastorage. Through the investigation, the EU will make a determination of whether or not Taiwan's granting of compulsory licenses for CD-Rs and CD-RWs is consistent with WTO commitments. Philips expects the Commission to issue its decision in mid-November. According to Philips, the Commission's options are to decide that satisfactory steps are being taken by Taiwan to eliminate the barrier to trade, or to seek a solution with Taiwan, or to initiate international dispute settlement proceedings in the WTO against Taiwan.

#### Comment

17. (SBU) The LY's failure to pass the current version of the amendment to Article 76 is a small victory for rights-holders in Taiwan, as is the progress in the Philips case. We will continue to engage TIPO to ensure Taiwan takes U.S. concerns into account before

finalizing the latest Patent Law amendment. No action on the amendment at all would be a positive outcome as well. End comment.